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## **Arbitration and Award--Constitutionality of Section 4A of the New York Arbitration Law (Finsilver, Still & Morse, Inc. v. Goldberg, Mass & Co., Inc., 253 N.Y. 382 (1930))**

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## RECENT DECISIONS

*Editor*—JULIA M. COOK

ARBITRATION AND AWARD—CONSTITUTIONALITY OF SECTION 4A OF THE NEW YORK ARBITRATION LAW.—Defendant signed and delivered to plaintiff an order for the purchase of merchandise. The order provided that all claims, disputes and differences arising out of the contract should be determined by arbitration pursuant to the Arbitration Laws of New York.<sup>1</sup> A dispute under this contract arose and the defendant refused to accept delivery, whereupon plaintiff demanded arbitration. The defendant company refusing to appear at the proceedings, they were conducted without it under the rules of the arbitration association. A judgment was entered for the plaintiff pursuant to an order of the Court and the motion of the defendant for a perpetual injunction, or in the alternative for a submission to a jury of the question of the existence of a contract was denied. The Appellate Division reversed the judgment and order on the ground that there had been denial of due process of law in that it required the defendant, a party to an alleged arbitration agreement, to waive either a hearing on the merits of a dispute, or a judicial determination that he consented to arbitration. On appeal, *Held*, that section 4A of the Arbitration Law is constitutional. *Finsilver, Still & Morse, Inc. v. Goldberg, Mass & Co., Inc.*, 253 N. Y. 382, 171 N. E. 579 (1930).

The Arbitration Law renders valid any award given in arbitration pursuant to a written contract to arbitrate, but allows a party who has not joined the arbitration, at any time before a final judgment shall have been given in proceedings to enforce any such award to apply to the Supreme Court to determine whether any contract to arbitrate was made.<sup>2</sup>

That section assures to a party, who either joins in arbitration proceedings or elects to stay out, the right to keep the proceedings open by a stay or by adjournments during which time a jury trial can be had to decide whether a valid contract was entered into in the beginning. There is no suggestion in the statute that, as a penalty for resistance, a party who elects to stay out of the arbitration proceedings shall forfeit any rights that would otherwise be his. The proceedings can always be kept open by a stay or by adjournments. Since these rights are allowed, the unsuccessful denial of the jurisdiction of the arbitrators will not prejudice the opportunity to go before them on the merits. Under section 3 of the New York Arbitration Law, arbitration could proceed only upon an order of the court if a party to an alleged arbitration agreement refused to take part. This was so even though the agreement made provision against such

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<sup>1</sup> Laws of 1920, ch. 275.

<sup>2</sup> *Ibid.*, sec. 4A (added by Laws of 1927, ch. 352).

default.<sup>3</sup> Thus a non-resident defendant, by avoiding service of an order of the court to arbitrate, could nullify a just obligation.<sup>4</sup> To do away with the evils thus resulting, section 4A was enacted in 1927, which makes the agreement self-operative without the need of a court order. This statute works no undue hardship on the parties. A statute requiring an analogous election in judicial proceedings has been held to be constitutional.<sup>5</sup> A temporary injunction directed against the arbitration proceedings would insure the unwilling party all his rights.<sup>6</sup> Such a procedure would not be against public policy and would fit our modern business plan by preventing unscrupulous persons outside the jurisdiction from escaping their contractual duties and obligations where a valid and effective award is rendered against them.

G. L.

**BANKS AND BANKING—FOLLOWING TRUST FUNDS IN BANK DEPOSITS.**—Defendant Waggoner, through the instrumentality of telegrams purporting to come to plaintiffs from their correspondent banks, induced them to deposit sums of money with the Chase National Bank, in this city, to the credit of the Bank of Telluride, of Colorado, an insolvent bank, of which he was president. Waggoner thereupon caused three cashier's checks to be drawn on the Chase National Bank which were blank as to date, name of payee and amount, and after filling in the blanks with the knowledge of the Chase National Bank, he procured one of them to be certified, the amount thereof being charged against the sum deposited by plaintiff banks. The second check, defendant endorsed in blank and presented the same to the Central Hanover Bank and Trust Company, which bank, having knowledge of the manner in which it had been issued, refused payment thereof, but upon endorsement by the defendant deposited it to the credit of the Telluride Bank. The third check was similarly deposited with the Central Bank, which procured the two checks to be certified by the Chase Bank and when paid applied the amount thereof to a worthless past indebtedness of the defendant Waggoner and corporations in which he was interested. In an action to determine the rights of and relations between the parties and for an accounting, in which the Central Bank attacks the sufficiency of the complaint, *Held*, the complaint states a cause of action to charge the corporate defendant as trustee *ex maleficio*; it is, however, incumbent upon the plaintiffs to trace the funds so deposited by them through the depository to the corporate defendant. *McAvoy, J.*, dis-

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<sup>3</sup> *Bullard v. Grace Co.*, 240 N. Y. 338, 148 N. E. 559 (1925).

<sup>4</sup> *Bankers & Shippers Ins. Co. v. Liverpool Marine & Gen. Ins. Co.*, 24 L. Rep. 85 (H. L., 1926).

<sup>5</sup> *York v. Texas*, 137 U. S. 15, Sup. Ct. (1890); (1930) 39 Yale L. J. 575.

<sup>6</sup> *Kitts v. Moore*, 1 Q. B. 253 (1894).